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Date: 12/19/03 1:44PM
Subject: Request for Comment - Pilot Program on Use of ADR in Enforcement Program (68 Fed. Reg. 67492; Dec 2 03)

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FDB reserved *[signature]*

Attached are the comments of the Nuclear Energy Institute in the above-referenced matter.

On behalf of
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One notice

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NUCLEAR ENERGY INSTITUTE

December 19, 2003

Mr. Michael T. Lesar
Chief, Rules and Directives Branch
Division of Administrative Services
Office of Administration
U.S. Nuclear Regulatory Commission
Mail Stop T-6 D59
Washington, DC 20555-0001

SUBJECT: Request for Comment on Implementation of a Pilot Program on the
Use of Alternative Dispute Resolution in the Enforcement Program
(68 Fed. Reg. 67492; December 2, 2003)

Dear Mr. Lesar:

On behalf of the commercial nuclear energy industry, the Nuclear Energy Institute¹ hereby submits comments for the agency's consideration as it develops an Alternative Dispute Resolution (ADR) pilot program for use in cases involving discrimination or other wrongdoing. This letter provides an overview of the industry's views and, as requested in the above-cited Federal Register notice, the attachment hereto responds specifically to the questions identified by the Nuclear Regulatory Commission (NRC) staff in the "ADR Pilot Program Discussion Issues" document.

The NRC issued a Staff Requirements Memorandum (SRM), dated September 8, 2003, directing the staff to develop and implement an ADR pilot program. In doing so, the Commission demonstrated a clear understanding of the need to apply a new paradigm to the agency's handling of discrimination and other wrongdoing cases. The Commission's strong leadership in this regard confirms the importance of instituting an effective ADR program wherein the agency voluntarily permits disputants to exercise greater control over the resolution of their dispute.

Consistent with the Commission's views, the industry believes there is potentially great value in offering an ADR pilot program for alleged discrimination and other

¹ NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including regulatory aspects of generic operational and technical issues. NEI's members include all utilities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, materials licensees, and other organizations and individuals involved in the nuclear energy industry.



wrongdoing. NEI, on behalf of the industry, has made clear in previous comments² that it supports implementation of an ADR program as an alternative to the current enforcement approach applied to alleged discrimination and other wrongdoing disputes.

The industry's support is based on its expectation that ADR can minimize the time to obtain a resolution; be less adversarial than the current processes; promote greater communication and, in turn, greater cooperation among the parties; minimize the need for a large commitment of staff and resources; and lead to more timely and better corrective action if such action is warranted. In sum, a properly designed and implemented ADR program should enable the employee and employer in a discrimination case to more quickly put the dispute behind them.

The industry is also aware that various other stakeholders have expressed consternation about ADR and its perceived effect on the NRC's regulatory authority to ensure public health and safety. As the Commission undoubtedly recognizes, the availability of ADR would leave undisturbed the agency's capability to protect the public health and safety, as ADR does not affect the agency's ongoing obligation to ensure that the underlying safety issue (subject of a discrimination allegation) has been or will be addressed. We also contemplate that the ADR program will further the NRC's ability to carry out its regulatory mission by providing for agency review of the resolution to ensure that it does not contain terms that would violate NRC requirements.

With respect to specific features that should be incorporated into the ADR pilot program, the industry suggests the following, with greater detail provided in the additional comments attached to this letter:

- ADR should be available for all discrimination cases as well as wrongdoing cases after an Office of Investigations (OI) investigation substantiates the alleged wrongdoing. The NRC should not develop criteria that, in practice, will so limit the use of ADR that many cases could be *screened out* based on overly broad criteria such as "egregiousness" or "creating precedent."
- As required by the Commission in the SRM, the pilot program should be developed to permit ADR to be offered at the earliest juncture in a discrimination case, i.e., following an Allegations Review Board (ARB)

² Letter from Ralph E. Beedle to Michael T. Lesar, January 28, 2002.

determination that the allegation sets forth the elements of a *prima facie* case of discrimination, *but prior to an agency investigation of the matter.*³

- Although the ADR techniques used at the early stage of a discrimination case are likely to be facilitation or mediation, no technique should be precluded if the parties believe it is an appropriate method to resolve a pending dispute.
- In the early stage of a discrimination case, the NRC would participate in two important ways: First, the NRC would be responsible for notifying the alleged of the availability of ADR and providing sufficient information about the process to enable the alleged to make an informed decision regarding the benefits of its use. Second, if the alleged and the licensee are able to reach a mutually agreeable resolution, the NRC would review the resolution to ensure it does not contain terms that would violate NRC requirements.
- In the later stages of a discrimination case, (post-investigation and afterward) the NRC and the licensee would be parties to the ADR proceeding. In a wrongdoing case, the parties would be the NRC and the licensee against whom the NRC proposes enforcement action.
- The NRC should develop a list of neutrals who possess the requisite level of ADR expertise and experience. This list may include qualified individuals from other federal agencies and/or private practice. The parties should be permitted to choose a mutually acceptable neutral from the NRC's list, but should not be precluded from identifying and agreeing to use a qualified individual not included in the NRC's pool of neutrals.
- During the pilot program, payment for the neutral's services (e.g., if not a government employee) and NRC staff time charged to ADR activities should be borne by the industry at large, through Section 170 user fees. Costs should be recovered in this manner because the pilot program will test the efficacy of ADR generically and has the potential to benefit all stakeholders and the agency through more timely and effective resolution of specific enforcement actions, while reducing the resources applied in these cases.
- Early ADR should be designed to permit the licensee and the employee to maintain a sufficient level of confidentiality to promote open, productive discussion (e.g., strengths and weaknesses in each party's position). Given that licensees and employees have a common interest in maintaining the confidentiality of the terms of a resolution to a dispute, the NRC must be careful not to structure the ADR program's confidentiality provisions such

³ Offering ADR at this point is likely to provide the greatest benefit to all parties, as neither has yet expended significant time, funds or emotional resources. However, ADR can also be valuable at later points in the enforcement process, and the industry supports opportunities for ADR at those junctures as well. The NRC has identified four appropriate ADR opportunities: prior to an OI investigation in a discrimination case, and in cases of both discrimination and other wrongdoing, at the post-investigation, post-NOV, and post-order stages. We recommend that the NRC also consider offering ADR in a case wherein an investigation has taken place but OI's findings have not yet been issued.

that they discourage the parties from using the program or chill the likelihood of frank discussion. The same logic also applies when the NRC and the licensees are the parties to ADR.

- Formal documentation initiating the pilot program and material developed to inform the public about ADR should make clear that if a resolution is agreed to by the parties and favorably reviewed by the NRC, no further NRC enforcement action will be pursued.
- Formal documentation initiating the pilot program and material developed to inform the public about ADR should make clear that ADR does not affect the agency's ongoing responsibility to ensure that the underlying safety issue has been or will be addressed.

Finally, the industry commends the agency for instituting a pilot program to test the use of ADR as a way of potentially resolving specific enforcement actions. The NRC has held two public meetings to discuss the possible features of the ADR program and obtain stakeholder views and recommendations prior to instituting the pilot. Obtaining stakeholder views at the outset should help to ensure development of a sound ADR program.

Once the pilot program is implemented, licensees, allegers and the NRC will have experience and data upon which to base additional insights. At some designated time after the pilot program has been implemented, and prior to establishing the program as a permanent part of the enforcement process, the NRC should again obtain stakeholder views to ensure that the program retains those features that served to enhance it and revise those that do not.

If you have questions about the industry's views or would like to discuss them further, please contact me or Ellen Ginsberg, NEI Deputy General Counsel, at (202) 739-8140 or ecg@nei.org.

Sincerely,



Charles M. Dugger
Vice President, Nuclear Operations

Attachment

By E-Mail
Hard Copy to Follow

INDUSTRY RESPONSES TO
“ADR PILOT PROGRAM DISCUSSION ISSUES” DOCUMENT

A. Selection of Cases Involving Potential Enforcement Actions for Which ADR Is Appropriate

The Administrative Dispute Resolution Act of 1996 (ADR Act) clearly mandates that administrative agencies consider the use of ADR in connection with enforcement actions.¹ While the industry believes ADR is appropriate for various types of enforcement cases, we support focusing the ADR pilot program on cases involving discrimination and wrongdoing.

However, in order to test its efficacy during the pilot period, ADR should be offered to the parties in virtually all cases involving discrimination allegations and wrongdoing. In the recent public meeting on ADR, industry representatives stressed that the NRC should not artificially limit the use of ADR by issuing broad criteria that, in practice, eliminate many cases from eligibility to participate in the pilot program. Given that the purpose of a pilot is to test the viability of ADR in this area, the value of the pilot will be largely lost if the NRC includes broad exceptions that are likely to decrease the pool of cases subject to ADR, and from which conclusions about the ADR program may be drawn.

The NRC's concern that it must retain control over “egregious” cases is particularly misplaced because every case involving discrimination arguably could be characterized as egregious. If a case does involve egregious facts, ADR may well be the best avenue to foster timely and effective corrective action. Additionally, because ADR can more efficiently promote reconciliation between the parties, and successful ADR outcomes are likely to favorably influence the work environment, limiting the opportunity for ADR would negate that important potential benefit. Thus, none of the five sample criteria identified in the “Discussion Issues” document, should be used as a basis for precluding a particular dispute or category of disputes from resolution through ADR.

B. Use of Specific ADR Techniques in the Pilot Program

In previous comments, NEI and other NRC stakeholders have suggested that the pilot program could include ADR techniques such as facilitation, mediation, arbitration and a “council” of the type used at the Department of Energy's Hanford site.² In sum, the pilot program should permit the parties to choose among all of

¹ See 5 USC § 572.

² While it appears to offer obvious benefits in certain circumstances, the council approach would require a considerably more complicated process and be more resource intensive than we believe is necessary for the initial ADR pilot program.

the various ADR techniques,³ although as is described below, we believe that certain techniques will be more widely used at various points when ADR is offered. There is no reason, however, to limit artificially the techniques available at a particular juncture, if the parties see a potential benefit to employing a particular technique ordinarily used at another stage of ADR.

The industry continues to believe that facilitation and mediation are likely to be the most appealing techniques for ADR in the pre-investigation stage of a discrimination case. These techniques are the least intrusive form of ADR, yet permit a neutral third party, who does not have actual authority to impose a solution, to help the participants define, assess and resolve a dispute.

In certain instances, the parties to an ADR proceeding on a discrimination claim may wish to use the neutral evaluation technique, in which a neutral conducts separate sessions with the parties to hear each party's position. The evaluator is responsible for identifying the strengths and weaknesses of the parties' positions as well as sharpening the focus on areas of agreement and dispute. Ultimately, the neutral evaluator will provide a nonbinding assessment of the merits of the case, with the goal of encouraging each side to see its weaknesses and strengths as a means of promoting a mutually agreeable resolution.

Following issuance of a Notice of Violation (NOV) or imposition of an Order, two other ADR techniques may be useful. One is the use of a settlement judge, who would take an active role in helping to conceptualize or craft a settlement. The second is arbitration.⁴ Arbitration assigns to the neutral the responsibility to reach a decision to which the parties to the dispute have agreed to be bound.⁵

C. The Role of the NRC in Early ADR

The licensee and alleged are the appropriate parties at this stage because the ultimate objective of early ADR is to produce reconciliation or some other outcome leading to a settlement of the dispute and, in turn, help to enhance the work environment. The industry believes the NRC should participate in the following two ways: (1) review the agreement reached by the parties to ensure it does not

³ Under the ADR Act, ADR is broadly defined as "any procedure that is used in lieu of an adjudication . . . to resolve issues in controversy, including but not limited to, settlement negotiations, conciliation, facilitation, mediation, fact-finding, minitrials, arbitration or any combination thereof." 5 USC § 581 (3).

⁴ This discussion relates to binding arbitration.

⁵ Courts typically will not overturn an arbitrator's decision unless there is clear evidence of undisclosed bias, the award violates public policy or the arbitrator did not have the requisite authority to confer the award. We recommend that, if arbitration is chosen, the NRC's review would nevertheless focus on ensuring the resolution does not contain terms that would violate NRC requirements.

contain terms that would violate NRC requirements; and (2) continue to ensure, through existing inspection and oversight methods, that the safety issue underlying the discrimination allegation has been or will be adequately addressed. Note that the early ADR construct should not present an opportunity for the NRC either to advocate on behalf of the employee or licensee, or to opine on whether a discriminatory act did or did not take place, as those actions are inconsistent with the very purpose of early ADR.

We recognize, as did the Commission in issuing the SRM, that the role outlined above is considerably different from the role the NRC typically performs in response to a discrimination claim. Both the NRC and other stakeholders have articulated varying degrees of concern, based on their perception that removing the agency from its typical role as decision-maker is an abdication of the NRC's regulatory responsibility.

As has been our position in previous comments, we believe that there are cogent reasons why such concerns should not derail development of a progressive ADR pilot program. For example, the Department of Labor employs a similar process to promote reconciliation prior to its formal evaluation and determination of discrimination. In addition, the NRC will continue to carry out its regulatory responsibility by reviewing the resolution to ensure it does not contain terms that would violate NRC requirements.⁶ Also, although reconciliation is directed at the employee and licensee as the primary disputants, the NRC may identify corrective actions related to the underlying safety issue *through the normal NRC inspection and oversight processes*.

D. Participation as a Party

If a discrimination claim proceeds to enforcement because the agency has made a finding that the claim is substantiated based on an OI investigation, the dispute at hand may result in either issuance of a NOV/proposed civil penalty or imposition of an Order. At those points, the dispute is between the NRC and the licensee or the NRC and the individual accused of wrongdoing.

The employee's participation in an enforcement action in a discrimination case should be a direct function of whether the dispute can be resolved simply by reaching a resolution with the employee. That is, prior to the OI investigation, the agency has not yet formally issued a NOV and, therefore, the dispute remains between the employee and the licensee. At a more advanced point, when an investigation has been completed and findings of discrimination have been made, the NRC and the licensee must resolve the pending NOV or issuance of an Order. The alleged's role at that point should be limited to providing the NRC with additional information, if requested to do so. The alleged also should be apprised of

⁶ This would include, for example, ensuring that the resolution does not contain restrictions on an employee's ability to report safety or other issues to management or the NRC in the future.

the outcome, if a resolution of the pending enforcement action occurs through the ADR proceeding.

E. Selection of Neutrals

The ADR Act provides few limitations on who may be considered to serve as a neutral in an ADR proceeding sponsored by a federal agency. The statute permits the parties to choose a “permanent or temporary officer or employee of the federal government or any other individual who is acceptable to the parties to a dispute resolution proceeding.”⁷

The NRC’s pilot program should follow the construct of the ADR Act. The pool of possible neutrals for the pilot program should include individuals who have expertise and experience necessary to facilitate, mediate or arbitrate the dispute involving allegations of potential discrimination.

The NRC should develop a roster of neutrals that would enable parties to quickly identify a previously screened individual on whom both parties can agree. In addition, the NRC should not preclude the parties from agreeing to choose a qualified neutral not listed on a NRC roster of neutrals. In sum, the parties should be permitted wide latitude in choosing a neutral, thereby effectively preempting any potential allegations of agency bias or other perceived issues.

F. Confidentiality

Confidentiality is one of the most significant attributes differentiating ADR from other more formal administrative or adjudicative processes. To force ADR sessions to become public, effectively would transform them into the very kind of proceedings to which ADR is intended to be an alternative. The NRC itself has, in previous announcements on this subject, stated that confidentiality is a critical feature of a successful ADR program: “[F]rank exchange may be achieved only if the participants know that what is said in the ADR process will not be used to their detriment in some later proceeding or in some other matter.”⁸

The industry recommends that written and oral communications should be afforded confidentiality to the extent a neutral is involved in the communications, as is provided for by the Administrative Dispute Resolution Act of 1996. This would include communications by the neutral that would be provided to all parties to the proceeding (e.g., initial neutral evaluations, settlement proposals, etc.). The analogy to settlement negotiations is persuasive in this regard. The reasons settlement negotiations are not public are equally applicable to maintaining confidentiality for ADR sessions and the associated documents.

⁷ 5 USC 573 (a).

⁸ See 66 Fed. Reg. 64892.

The NRC's Discussion Issues Paper implies that different confidentiality provisions applied based on "the point in the process at which ADR is offered."⁹ The industry believes that this approach would not be productive as there is no clear policy basis upon which to differentiate between these proceedings for purposes of determining the level of confidentiality provided. The industry, therefore, urges the NRC to construct the pilot program to offer the maximum level of confidentiality permitted under the ADR Act at each point at which ADR is available.

G. ADR-Related Information Available to the Public

Stakeholders representing allegeders and other interests have expressed concern about ADR proceedings being conducted "behind closed doors" and, therefore, not sufficiently subject to public scrutiny. As part of the pilot program, the NRC should address this concern by developing written information to inform members of the public about the purpose and scope of the ADR process, including how various ADR methods are implemented.

In addition, the industry recommends that the ADR process include certain public notifications. When a resolution is reached, the NRC should treat the information and documentation associated with ADR in the same manner as comparable allegation information under the current allegation process.

H. Allocation of Costs for ADR

During the pilot program, payment for the neutral's services (e.g., if not a government employee) and NRC staff time charged to ADR activities should be borne by the industry at large through Section 170 user fees. This approach should be used during the pilot program because the program will test the efficacy of ADR generically. Further, the pilot program also potentially will benefit all stakeholders and the NRC through achievement of more timely and effective resolution of specific enforcement actions, while reducing the resources necessary to be applied in these cases.

I. Program Evaluation

In the "Discussion Issues" paper, the staff set out four multifaceted factors that may be considered in determining the program's success. These include efficiency in terms of cost and time savings, effectiveness of the resolutions including the impact on the work environment, whether the program is "workable and effective," and "program quality in terms of the performance of the program participants."

⁹ ADR Pilot Program Discussion Issues, at 5.

The industry believes that the program should be evaluated primarily for its effectiveness. This is likely to be a largely qualitative evaluation, but could consider the level of use, the successful resolution of pending disputes, the timeliness of the ADR process, the level of user satisfaction, the overall efficiency of the process, and the resource and cost savings to all parties and the NRC.

We believe that the evaluative method should not rely solely on cases resolved, as it would be unrealistic to expect instant and complete success for ADR. That said, the industry believes that ADR offers tremendous promise in this regard, and it may well be the case that a number of attempts at ADR must be made before success is achieved.

The industry also cautions against limiting the pilot to a short period of time. The fact that relatively few cases exist for which this program would be applicable argues in favor of elongating the time to test its merit. Thus, we believe that the NRC should permit the program to run at least 24 months, and preferably 36 months, before evaluating it.

J. Matters Related to Internal NRC Management

We take no position on the ADR pilot program's potential impact on internal NRC management procedures. We do note, however, that the "Discussion Issues" paper makes passing reference to "pre-approved . . . negotiating guidelines," without providing any further explanation. To the extent that such a guideline would somehow limit the ability of participants to fashion creative resolutions, we do not support its development.

With respect to the coordination of the ADR program and the agency enforcement process, it is important to ensure that successful resolution of a matter through the use of ADR precludes any further enforcement action. Similarly, when ADR is undertaken but not successful, this result should not be held against the participants, because ADR is a voluntary process designed to bring the parties together to agree to a resolution, if such an agreement voluntarily can be achieved.